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Supreme Court of the United States.

OCTOBER TERM, 1948.

WORCESTER WOOLEN MILLS CORPORATION,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

PETITION.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Worcester Woolen Mills Corporation (hereinafter referred to as the Employer) prays that a Writ of Certiorari be issued by this Court to review the decree of the United States Circuit Court of Appeals for the First Circuit entered in case #4346, National Labor Relations Board vs. Worcester Woolen Mills Corporation, on October 4, 1948, enforcing an order of the National Labor Relations Board (hereinafter referred to as the Board).

JURISDICTION.

The decree of the Circuit Court of Appeals for the First Circuit was entered October 4, 1948 (R. p. 138).

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code (as amended by the Act of February

13, 1925); 43 Stat. 938; 28 U.S.C. 347 (a); and under Section 10 (e) of the National Labor Relations Act (49 Stat. 449; 29 U.S.C. 151 et seq.).

Statute Involved.

The statute involved is the National Labor Relations Act (hereinafter referred to as the Act).

The Taft-Hartley Act, so-called, does not apply, having been enacted subsequent to the commencement of the proceedings here involved.

Opinions Below.

The opinion of the Circuit Court of Appeals for the First Circuit (R. pp. 129–136) is not yet reported.

The decision and order of the respondent, National Labor Relations Board (R. pp. 58–60) are reported in 74 N.L.R.B. 1071, and the decision and direction of the Board in the prior representation proceedings are reported in 69 N.L.R.B. 425.

Proceedings before the Board.

"A"

The Representation Proceedings.

On April 30, 1946, a hearing before a trial examiner of the Board was held. The Union and the Employer participated. The Employer contended before the Board:

1. That the Board agent selected the Employer's observer without consulting it, and failed properly to instruct her.

2. That certain illegal actions on the part of employees, who belonged to the Union, engaging in an unlawful or wildcat strike, illegal acts of intimidation, coercion, fraud, and obtaining authorization cards before election, so influenced the employees that they were deprived of a free choice in the election, and the election was therefore illegal; and, that the acts complained of were of such character that those engaging

in such acts lost their status as employees, and were not entitled to vote, and in fact the entire election was void.

3. That five named individuals[1] were ineligible to vote, but, nevertheless, cast ballots.

4. That six challenges by the Employer should be sustained. The Board overruled the Employer's contentions. The Board sustained three of the Employer's challenges, overruled two challenges[2] (R. pp. 4–9), and reserved consideration of one challenge.[3] A Supplemental Tally made by the Board on July 19, 1946, showed that out of the sixty-seven eligible voters, fifty-nine valid ballots were cast, thirty-two were for the Union and twenty-seven were against it (R. p. 11). The Board on July 25, 1946, certified the Union as exclusive bargaining representative of the employees (R. p. 12).

"B"

The Unfair Labor Practice Proceedings.

An amended charge (R. p. 93) having been filed by the Textile Workers Union of America, C.I.O., (hereinafter called the Union), the Board by its Regional Director for the First Region (Boston, Massachusetts) issued its complaint, dated October 7, 1946, against the Employer, charging the Employer with refusal to bargain collectively with the Union as the exclusive representative of the Company's employees.

The complaint (R. pp. 94–96) alleged that the Employer thereby had engaged in unfair labor practices affecting commerce within the meaning of Section 8 (1) and (5), and Section 2 (6) and (7) of the National Labor Relations Act (49 Stat. 449; 29 U.S.C. 151) (R. pp. 94–96).

In answer to the complaint, the Employer admitted it was engaged in interstate commerce, admitted that it refused to bargain collectively with the Union, but alleged that its refusal was proper because: (R. pp. 98–101)

[1] J. Lynch, J. Leonard, Wyman Sperry, James Dulligan, and Maud Hiller.
[2] William Paris and James Paris.
[3] Philip Kent.

A. The election in which the Union was designated as the representative of the employees of the Company for the purpose of collective bargaining was invalid.

B. That persons who, because of the Company rule and the wildcat strike, were no longer employees of the Company on the eligibility date, had been allowed to vote.

1. Failure to challenge such persons at the election did not deprive the Company of the right to have the ballots declared void.

C. That the Union had lost its majority after the election and before it had either been certified by the Board or made its request to bargain collectively.

D. That the circulation of false and libellous statements about the Employer's principal officer relieved it of the obligation to recognize the Union for collective bargaining purposes (R. pp. 103–105).

A hearing was held on November 7, 1946, at Worcester, Massachusetts, before a Trial Examiner, duly designated by the Board. The Board, the Employer, and the Union participated in the hearing.

On November 21, 1946, the Trial Examiner filed an intermediate report (R. pp. 63–72), finding that the Employer had refused and is refusing to bargain collectively with the Union, which was on March 22, 1946, and at all times thereafter the exclusive bargaining representative of the employees.

The Employer filed exceptions to the report (R. pp. 74–76).

The Board issued its decision and order on August 15, 1947, (R. pp. 58–62). In its decision, the Board found that no prejudicial error had been committed. It affirmed the rulings of the Trial Examiner, and adopted his findings, conclusions, and recommendations, and concluded that the Employer had refused to bargain collectively with the Union, and issued an order directing the Employer to cease and desist from refusing to bargain with the Union as the exclusive agent of the employees and ordering it to bargain.

The Facts.

The Petitioner is a Massachusetts corporation engaged in the manufacture, sale, and distribution of woolen cloth. The

Petitioner is engaged in and admits that it is engaged in commerce within the meaning of the National Labor Relations Act.

A few days prior to February 27, 1946, a committee of the Petitioner's employees requested the Petitioner to recognize the Textile Worker's Union of America, C.I.O., as their exclusive bargaining representative. The Petitioner asked that a proper election leading to certification by the Board be held. The committee agreed to this request.

The Petitioner had a Company rule, which had been in effect since the business started in 1936. This rule provided that any employee voluntarily quitting work, terminated his status as an employee, and was dropped from the payroll. There was no seniority system, and no sick leave. Employees who were out sick, were rehired as new employees upon their return, if the Employer saw fit to rehire them. Employees who were out for more than one (1) day were dropped from the payroll, and were immediately replaced, if possible. Any employee who sought re-employment was rehired as a new employee, only if the Petitioner wished to rehire him. There was no provision for vacation leaves or for temporary layoffs (R. pp. 7, 8, 9, 22, 119, 120, 121, 125 and 126).

On February 27, 1946, a strike of some of the Petitioner's employees occurred, without any notice, and in spite of the prior agreement to hold an election.

On February 28, 1946, the Union caused a petition for certification to be prepared (R. pp. 50–51). This petition was docketed on March 4, 1946.

A day or two after the strike started, the Employer invited the strikers, who were then on the picket line, to return to work, and advised them that if they did not return, it would immediately try to replace them.

On March 4, 1946, at a hearing held before the Massachusetts State Board of Conciliation, the Employer stated it would take the strikers back. The committee representing the strikers refused to return, unless the Employer agreed to recognize the Union. The Employer then stated, that it would be considered that the employees had left their employ-

ment, and were off the payroll. Subsequently, the Employer did replace the strikers, and notified them thereof (R. p. 28).

On March 6, 1946, the Employer agreed to accept a recommendation of the Federal Labor Conciliator that the strike be terminated, and all striking employees be reinstated, without discrimination, to the job and shift on which they were employed when the strike started, but only if and when work became available. The Federal Labor Conciliator notified the Union of this by letter dated March 15, 1946 (R. p. 24).

Most of the strikers came back to work on March 11, 1946.

On March 15, 1946, the Board's Regional Director ordered a pre-hearing election for March 22, 1946. The eligibility rules issued for this election provided that the voting unit should consist of "all employees of the Company who appeared on the payroll as of March 12, 1946" (R. p. 54). The Employer was duly advised, and it was also advised that it had a right to appoint an observer.

On March 22, 1946, the agent of the Board in charge did not consult the Employer as to its designation of an observer at the election. He met the Employer's bookkeeper as she entered the factory to deliver a pay check, and designated her as observer for the Employer during the balloting.

The Board agent handed the Employer's bookkeeper a list of the Company's employees as of March 12, 1946. This list had been prepared by the Employer's bookkeeper, and sent to the Board (R. pp. 29–30). There was evidence that the Board agent did not instruct the Employer's observer as to her duties, or else gave her inadequate instructions (R. pp. 40–41).

James Paris and William Paris were challenged by the Employer's observer. They had been on strike. On March 11, 1946, they applied for work. There was no work for them. They were not rehired until after the eligibility date (R. p. 18). Their names were not on the typewritten eligibility list, but were added in pencil to the typewritten list (R. p. 111).

J. Lynch, J. Leonard, Wyman Sperry, James Dulligan, and Maud Hiller did not appear on the typewritten list of eligible voters. Their names were added in pencil, and they

were permitted to vote without challenge. The Employer's observer did not challenge them, because of the conduct and statements of the Board agent. They were not in the employ of the Company on March 12, 1946. They were not rehired until after March 12, 1946. There is no evidence that these five ever applied for work until after March 12, 1946.

At the representation hearing, and again at the hearing of the unfair labor practice charge, the Employer sought to introduce evidence of the conduct of the strikers, evidence of fraud, coercion, and intimidation of the Company's employees by the strikers, as further evidence of the illegality of the strike. The evidence was excluded. The Trial Examiner excluded admission of two circulars issued by the Union after the certification, criticising the Employer's chief officer (R. pp. 91, 103–105).

On July 25, 1946, the Board certified the Union as the bargaining representative of the Company's employees (R. p. 12). But, by July 6, 1946, ten of the employees had terminated their employment. Of these, at least six were engaged in the strike of February, 1946 (R. pp. 89, 90).

Questions Presented.

I. Whether an agent of the National Labor Relations Board has properly conducted a pre-hearing election,

a. In designating an observer for the Employer without consulting the Employer, although the Employer had been notified that it could appoint an observer,

b. In failing to instruct the observer fully and adequately,

c. In interfering with and discouragiug the observer of the Employer from challenging persons who claimed to be employees, but whose names did not appear on the typewritten list of those eligible to vote,

d. In failing to challenge persons who were not on the eligibility list, and whose eligibility to vote was doubtful,

e. In ruling at the election that certain persons, whose eligibility to vote was doubtful, were eligible to vote.

II. Whether a Company rule, applied without discrimination, must be recognized by the Board and given proper effect.

III. Whether employees, who engage in a wildcat strike, who are replaced, and who automatically are discharged under the Company rule, lose the right to vote at certification proceedings.

IV. Whether impropriety on the part of an agent of the Board in conducting the election permits post-election challenges, or even voids the election.

V. Whether the loss of a majority by a Union prior to certification relieves the Employer from the obligation to bargain,

a. The fact that at least six employees, who had voted and who had been on strike, left the employment prior to certification, compelled the inference and conclusion that they had voted for the Union.

VI. Whether the Board erred in excluding evidence of illegal conduct on the part of the strikers.

VII. Whether the Board erred in failing to admit in evidence derogatory circulars issued by the Union after the certification concerning the Employer's chief officer.

Petitioner's Contentions.

1. The conduct of the agent of the Board was improper, and by reason thereof the rights of the Employer were prejudiced.

2. A Company rule extant for many years, and applied without discrimination, must be given full recognition by the Board.

3. Persons, who are no longer employees by reason of a Company rule, and who have not been rehired on the eligibility date, and who went on strike in spite of an agreement to hold an election, cannot vote in representation proceedings.

4. Where the conduct of the Board agent was improper or illegal, the election is void, and an exception to the rule against post-election challenges arises.

5. Where, after an election and before certification, former strikers leave the employ of the Employer, a conclusion is required that such employees voted for the Union, and the pro-Union vote was decreased accordingly.

6. The Board erred in failing to admit evidence of the Union's derogatory circulars.

7. The Board erred in failing to admit evidence of the illegal acts on the part of the strikers.

Reasons for Granting the Writ.

The case, here presented for review, involves important questions of Federal law, which should be settled by this Court.

A determination of the proper conduct of a pre-hearing election, and of the conduct of the Board agent at such election, is important for the future proper administration of the Act.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, and this Court should review the decision of the Circuit Court of Appeals for the First Circuit, and finally reverse it.

COSIMO J. TOSCANO,
Attorney for Petitioner.

Howard W. Cowee,
Harry Zarrow,
Simon Friedman,
Of Counsel.

BRIEF IN SUPPORT OF PETITION.

Specifications of Errors.

The Circuit Court of Appeals for the First Circuit erred:

1. In holding that two persons who were challenged, were eligible to vote.

2. In failing to give effect to the Company rule that employees who quit, lose their status as employees.

3. In failing to find that at the time the strike occurred, there was no current labor dispute, and therefore the Company rule of automatic discharge applied.

4. In holding that post-election challenges are not permitted, even if there is evidence of improper conduct of the pre-hearing election.

5. In holding that the Board agent may permit the payroll list to be amended during election, by adding thereto names of persons who claimed to be employees.

6. In holding that the designation of the observer, without consulting the Employer, was proper.

7. In holding that the Board agent properly instructed the observer for the Employer as to the right to challenge.

8. In failing to find that the Board agent acted improperly in interfering with and discouraging challenges by the Employer's observer.

9. In failing to hold that the Union had lost its majority before the certification, and that the Petitioner was thereby excused from bargaining.

10. In holding that the Board's exclusion of evidence of derogatory circulars was proper.

11. In holding that the exclusion of evidence of illegal acts on the part of strikers was proper.

12. In enforcing the order of the Board.

Argument.

Point I.

The Board agent's conduct of the pre-hearing election was improper, and the election was therefore void.

While it is true that the Act does not require that an observer for the parties be appointed, *Marlin Rockwell Corporation* vs. *National Labor Relations Board*, 116 Fed. (2d) 586, 588, nevertheless, the Board does have the right in its discretion to permit the presence of observers for the parties on the ballot and for the Company.

The Board in this case did exercise its discretion in favor of permitting observers, and notified the Employer accordingly (R. p. 54). It is provided under the rules of the Board, that there must be an agent present at each election. His duties include the duty to challenge voters for cause. The observers, it is provided, are to assist the agent, who must supervise them. See: Instruction to Election Agents, N.L.R.B. 721—May 1, 1945.

The designation of an observer for the Company without consulting the Company results in a mere idle gesture; it results in a spectre without substance; a ghost without a body.

If the Board agent does take it upon himself to appoint an observer for the Company, he must make doubly sure that full instructions are given so that the democratic process, which provides for challenging of voters, may be properly preserved. *National Labor Relations Board* vs. *A. J. Tower & Company*, 329 U.S. 324. The very fact that the Company observer failed to challenge persons, whose names were not on the typewritten list, compels the inference that the instructions were inadequate. Nowhere, is there any evidence that the Board agent gave the Company observer a written copy of the instructions to election observers. See: Instructions to Election Observers, N.L.R.B. 722—April 1, 1945.

There is evidence that the Board agent discouraged the observer from challenging voters (R. p. 35). Yet, the Board disbelieves everything the Company witnesses said, and

believes only the Union witnesses. Bias, such as this, is ground for reversal.

Moreover, the Act requires a Board agent to be present at the election. Observers are designated merely to assist the agent. If the observers fail to challenge persons, whose names do not appear on the eligibility list, then it becomes the duty of the Board agent to challenge them.[1] Since there is clearly some doubt as to the status of persons not on the list, the Board agent had no right to decide as to the eligibility of these persons to vote. The Board agent had no right to make rulings. *River Raisin Paper Company, 70 National Labor Relations Board, No. 137; Knox Metal Products, Inc., 75 National Labor Relations Board, No. 36; Beggs & Cobb, Inc., 62 National Labor Relations Board, No. 193; National Labor Relations Board* vs. *Ohio Calcium Company*, 133 Fed. (2d) 721.

The Employer at the request of the Board had submitted a list of the names on the payroll as of March 12, 1946, the eligibility date. While voting was taking place, the Board agent directed and caused the list to be altered by adding to it the names of persons who claimed they were employees and were eligible to vote. Clearly, the absence of such persons from the payroll list submitted by the Employer, meant that their eligibility to vote was doubtful. In directing that their names be added and permitting them to vote, the Board agent was ruling on their eligibility to vote. The Board agent thus exceeded his powers and neglected his duties. *Freezer & Son, Inc., 74 National Labor Relations Board, No. 215; N.A.P.A., New York Warehouses, Inc., 75 National Labor Relations Board, No. 154; Westinghouse Electric Corp., 78 National Labor Relations Board, No. 38.*

Point II.

The Board's failure to recognize a Company rule applied evenly, without discrimination, was erroneous.

Under the Employer's Company rule, employees who left their work voluntarily, lost their status as employees; their

[1] J. Lynch, J. Leonard, Wyman Sperry, James Dulligan, and Maud Hiller.

employment was terminated; if they ever reapplied for work, and were hired, it was only as new employees. Under this rule, the two employees, who were challenged,[2] and the five who were not challenged,[3] having voluntarily left their work in February, 1946, thereby terminated their employment. This rule must be given full recognition and effect. *Bryan Mfg. Co., 68 National Labor Relations Board, No. 197; National Labor Relations Board* vs. *Williamson-Dickie Mfg. Co.*, 130 Fed. (2d) 260; *National Labor Relations Board* vs. *William Davies Co.*, 135 Fed. (2d) 179; *Joseph Dyson & Sons, Inc., 72 National Labor Relations Board, No. 82.*

The fact that the men involved were on strike, in no way aids them. On or about February 25, 1946, the employees through their committee had agreed that an ordered election be conducted under the auspices of the Board, to determine an exclusive bargaining agent. The strike, which took place two days later, without notice to the Employer, and in spite of the agreement, constituted the strike a "wildcat," or illegal strike. There was no current labor dispute. The Board's finding that the strike was for Union recognition is unsupported by any evidence, since there was an agreement to hold an election. *National Labor Relations Board* vs. *Draper Co.*, 145 Fed. (2d) 199; *Solvay Process Company, 47 National Labor Relations Board, No. 1113; Tampa Shipbuilding Co., 50 National Labor Relations Board, No. 177; North Electric Manufacturing Co.* vs. *National Labor Relations Board*, 123 Fed. (2d) 887; *Chamberlain Corporation, 75 National Labor Relations Board, No. 138.*

In the absence of a current labor dispute at the time of the strike, the Company rule of automatic discharge applies to persons who were not on the typewritten list, but whose names were added to that list in pencil. Clearly, William Paris and James Paris, who were challenged, should not have been eligible to vote (R. p. 28). *Western Cartridge Co.* vs. *National Labor Relations Board*, 139 Fed. (2d) 855; *National Labor Relations Board* vs. *Columbian Enameling & Stamping Co., Inc.*, 96 Fed. (2d) 948.

[2] William Paris and James Paris.
[3] J. Lynch, J. Leonard, Wyman Sperry, James Dulligan, and Maud Hiller.

Likewise, the five who were not challenged, were no longer employees, and were not eligible to vote. Moreover, there is no evidence that these five ever applied for work until after March 12, 1946, the eligibility date.

It, therefore, follows that the Board erred in ruling that William Paris and James Paris were employees temporarily laid off (R. p. 8). The Board also erred in ruling that in any event the five who were not challenged remained employees during the (illegal or wildcat) strike, and after the strike were temporarily laid off (R. p. 6). This ruling by the Board disregards the Company rule, as well as the effect of illegal strikes.

Point III.

Impropriety on the part of the Board agent in the conduct of the pre-hearing election voids the election.

It is true that this Court has stated that the Board's rule against post-election challenges will be upheld. *National Labor Relations Board* vs. *A. J. Tower Co.*, 329 U.S. 324. Yet, in that same case, this Court very properly pointed out that if the Board agent improperly conducted the election, the election is void.

The Board has recognized the exception to the general rule of the Tower case, in the cases of *Westinghouse Electric Corp., 78 National Labor Relations Board, No. 38*, and *P. N. Joslin Co., 79 National Labor Relations Board, No. 134.*

This Court cited with approval the cases of *Matter of Hale, 62 National Labor Relations Board, No. 1393*, and *Matter of Beggs & Cobb, Inc., 62 National Labor Relations Board, No. 193*, to the effect that the rule against post-election challenges cannot be used as a cloak for impropriety in the conduct of the election by the Board agent.

Point IV.

The loss of a majority by the Union after election, but before certification, relieves the Employer of the obligation to bargain.

In the Intermediate Report, the Trial Examiner states that the record does not disclose that any changes have taken place with respect to the size of the appropriate unit (R. p. 67—footnote 4). Clearly, this is wrong. The evidence (R. p. 89) shows that a stipulation was entered into by the parties, setting forth the names and dates on which some twelve persons terminated their employment. It is further stipulated, these persons had voted, and that eight of them had been actively engaged in the strike of February, 1946. It further appears, that ten of these left before the certification date.

These facts compel a conclusion that persons who were actively engaged in a strike, voted pro-Union. And, if that is true, it must follow that the pro-Union majority was decreased accordingly.

While it is true that there is a rule in favor of reasonable durability of the Board's determination, based on the results of secret election, *Frank Bros. Co.* vs. *National Labor Relations Board*, 321 U.S. 702, yet, where the Employer produces substantial evidence of a decrease of the Union majority, it then must follow that the burden should shift to the Union to show that it retained a majority. The Employer has no right to ascertain the Union membership or sympathy among his employees.

Where the Union majority has been dissipated without fault of the Employer, the Union no longer possesses authority to speak for the employees, and the Employer cannot be required to bargain with the Union. *N.L.R.B.* vs. *Inter City Advertising Co.*, 154 Fed. (2d) 244; *N.L.R.B.* vs. *Karp Metal Products Co.*, 134 Fed. (2d) 954. In *N.L.R.B.* vs. *Highland Park Mfg. Co.*, 110 Fed. (2d) 632, it is intimated that loss of majority without fault of the Employer, will relieve the Employer from a duty to bargain.

To permit persons to come in and vote, and thereafter

terminate their employment, which established their right to vote, would result in a false expression of the will of the majority.

Point V.

The exclusion of evidence offered by the Employer relative to illegal actions on the part of the strikers, and also relative to derogatory circulars issued after certification, was erroneous.

The exclusion of evidence concerning alleged illegal action on the part of the strikers, prejudiced the rights of the Employer. Such evidence has been admitted in other cases to show that coercion and intimidation resulted, so that persons voted contrary to their real and true will. Such evidence has likewise been admitted to prove that certain strikers, because of such conduct, lost their status as employees with the right to vote in an election, *N.L.R.B.* vs. *Dadourian Export Co.*, 138 Fed. (2d) 891; *N.L.R.B.* vs. *Brashear Freight Lines*, 119 Fed. (2d) 379; *N.L.R.B.* vs. *Ohio Calcium Co.*, 133 Fed. (2d) 721.

The invasion of the employees' right of freedom of choice of a bargaining agent, is a wrong, which renders the election void.

The exclusion of the circulars (R. pp. 103–105) issued after the certification likewise prejudices the Employer's rights. The foundation of fair bargaining is destroyed by the severe criticism contained therein. The ensuing hostility relieves the Employer from the duty to bargain. *N.L.R.B.* vs. *Aintree Corp.*, 135 Fed. (2d) 395.

Conclusion.

The Board's orders as confirmed by the Circuit Court of Appeals are erroneous as a matter of law, and are unwarranted by the evidence. The election is totally void. The rights of the Employer have been abrogated to such an extent that the

election is void, and it is relieved of any duty to bargain with the Union. We, therefore, respectfully urge that this Court grant the Writ.

Respectfully submitted,
COSIMO J. TOSCANO,
Attorney for Petitioner.

HOWARD W. COWEE,
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SIMON FRIEDMAN,
Of Counsel.

APPENDIX A.

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD.

N.L.R.B. 721 (5–1–45)—INSTRUCTIONS TO ELECTION AGENTS.

Duties. In the conduct of this election you are a sworn Agent of the United States Government, representing the National Labor Relations Board. Your duty as such representative is to see that the election is fairly conducted, that there is no confusion at the voting places, and that the voters are permitted to mark their ballots in secret. Your attitude throughout the election, in words and in conduct, must be one of absolute impartiality. The voters should be treated with consideration and the election should be so conducted that the voters leave the voting places with the knowledge that the election is fair and secret. You will be given a badge which you must wear while in and around the place of election.

Responsibilities. One Agent will be in charge of each voting place and will be responsible for the conduct of the election at that place. When necessary there will be, in addition, another Agent at each checking table.

Observers. There will be groups of authorized observers from each organization named on the ballot and from the company. They will assist the Agent and be supervised by him. One observer of each group will act as a checker. Any others will be assigned as watchers at the ballot boxes and booths. The observers will be given badges which must be worn while they are on duty. No observer shall leave the voting place without the permission of the Agent. At the end of a period of duty at a polling place observers shall sign the certification on the conduct of the election and return their badges to the Board Agent. No observer will be permitted to keep any record of who has or has not voted.

Identification of Voters. Observers assigned as checkers are responsible for checking the voters against the eligibility lists. They will sit at one side of the table. Each voting table will have one list of the eligible employees who are to vote at that table. As each employee approaches the table, the Board Agent will ask his name and number. The checkers will then locate his name on the eligibility list. If no question of identification is raised, both checkers will check the name, preferably with different colored pencils. The Agent will then give the voter his ballot.

Balloting. The Agent is in charge of the ballots. He should tell the voter to mark the ballot in a booth. If the voter spoils the ballot, the Agent should keep the spoiled ballot and give the voter a new one. If a voter enters a booth already occupied by a voter, both voters will be required to return their ballots to the Agent, who will immediately destroy them, exercising care not to disclose any markings thereon. The Agent will then issue fresh blank ballots to each voter and conduct them to separate booths. With these exceptions, only one ballot should be given to each voter. The Agent must see that the unused ballots are watched and not touched by anyone other than an Agent. After the voter has marked his ballot and folded it in a voting booth, he should deposit the folded ballot in the ballot box. No voter should be permitted to leave the voting place with a ballot, whether marked, spoiled, or not marked. The Agent must not leave the voting place during the voting unless a relief Agent is assigned to take his place.

Challenges. Voters may be challenged for cause by the observers or an Agent. If a voter is challenged, he should step out of line so as not to hold up the voting. The Agent at the checking table should fill out the blanks on the face of the challenged ballot envelope and if there is a special Challenge Agent the voter is sent with the challenged ballot envelope to him. The Challenge Agent or the Agent at the challenge table then gives the voter a ballot and a small secret ballot envelope, instructing him to mark the ballot

in the ordinary way, seal it in the small envelope, and return with it to the Agent. When he returns with it, he is given the large challenged ballot envelope. The voter then places the small envelope in the large envelope, seals that envelope, and the Agent writes on the back of the large envelope, or on a separate Challenge Sheet, such pertinent facts as he can get relative to the reason for challenge. The voter then deposits the large envelope in the ballot box. If it becomes necessary to pass on the challenged ballot after the other votes are counted, the validity of the challenge will then be determined. If the vote is valid, the secret ballot envelope will be taken out of the large envelope so that the identity of the challenged voter will not be known when the vote is counted. A challenged vote is still a secret vote.

Assistance to Voters. If a voter does not understand the ballot and desires assistance, only the Agent may explain the ballot to him and give him any other necessary assistance. The Agent may not (1) inquire as to how the voter wishes to vote, (2) mark the ballot for the voter, (3) observe the marking of the ballot, (4) examine the ballot after it is marked, even though the voter requests it, (5) enter the booth with the voter. All explanation of the ballot shall be made in the presence of an observer from each party.

Ballot Boxes. The ballot boxes should be inspected by the Agent in the presence of the observers immediately before the voting commences to see that the boxes are empty. At the close of the voting, they will be sealed by the Agent in the presence of and signatured by the observers. The boxes will then be collected according to prior arrangement.

Closing of Polls. At the close of the voting, the Agent will collect the eligibility lists and the badges of the observers. He will have the observers sign the Certification on Conduct of Election and will himself sign. The lists, badges, extra ballots, spoiled ballots, and certifications will be given to the Agent in charge.

Special Problems. In case of any difficulty which the Agent cannot adjust, he should at once communicate with the

Agent in charge. If, for any reason, difficulty arises in connection with any particular employee, he should be asked to step out of line until the difficulty is settled so that the other employees may proceed to vote.

Counting. Agents will supervise the counting of the ballots. Instructions on counting procedure will be given after the polls are closed and immediately preceding the counting.

NATIONAL LABOR RELATIONS BOARD.

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD.

N.L.R.B. 722 (4-1-45)—INSTRUCTIONS TO ELECTION OBSERVERS.

Duties and Privileges (General):

1. Act as checkers and watchers.
2. Assist in identification of voters.
3. Challenge voters and ballots.
4. Otherwise assist agents of the Board.

Things to Do (Specific):

1. Identify voter.
2. Check off the name of the person applying to vote. One check before the name by one organization. One check after the name by the other organization or the Company.
3. See that only one voter occupies a booth at any one time.
4. See that each voter deposits a ballot in the ballot box.
5. See that each voter leaves the voting room immediately after depositing his ballot.
6. Report any conflict as to the right to vote to the agent of the Board at your table.

7. Remain in the voting place until all ballots are counted in order to check on the fairness of the count, if ballots are counted at that time. If they are not counted immediately, you will be informed as to when and where ballots will be counted.
8. Report any irregularities to the Board agent as soon as noticed.
9. Challenge voters only for good cause.
10. Wear your observer badge at all times during the conduct of the election.
11. **Be on Time.** (One-half hour before the time for the opening of the polls.)

Things Not to Do (Specific):

1. Give any help to any voter. Only an agent of the Board can assist the voter.
2. Electioneer any place during the hours of the election.
3. Argue regarding the election, except in the presence of a Board agent.
4. Leave the polling place without the agent's consent.
5. Use intoxicating liquors.
6. Keep any list of those who have or have not voted.

As an official representative of your organization, you should enter upon this task with a fair and open mind. Conduct yourself so that no one can find fault with your actions during the election.

You are here to see that the election is conducted in a fair and impartial manner, so that each eligible voter has a fair and equal chance to express himself freely and in secret.

NATIONAL LABOR RELATIONS BOARD.

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 454

WORCESTER WOOLEN MILLS CORPORATION,

PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 129-136) is not yet reported. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 58-73) are reported in 74 N. L. R. B. 1071. The decision and direction of the Board in the prior representation proceedings which forms part of the record in this case (R. 1-10) are reported in 69 N. L. R. B. 425.

JURISDICTION

The decree of the court below (R. 136) was entered on October 4, 1948. The petition for a writ of certiorari was filed on December 8, 1948. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254, and Section 10 (e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Whether an agent of the National Labor Relations Board who conducted an election committed prejudicial error affecting the validity of the election when, with the knowledge of but without objection by the employer, he appointed a qualified employee to act as the observer for the employer at the election after the employer, although notified that it could do so, had failed itself to select an observer.

2. Whether there is substantial evidence to support the Board's finding that the Board agent properly instructed the observer so appointed.

3. Whether the Board properly refused to consider post-election challenges to the eligibility of certain voters.

4. Whether the Board properly determined that strikers who had not been replaced but whom the employer had agreed to reinstate as soon as work was available and who did not return to work until after the eligibility date because of lack of work, were in the category of temporarily laid-off employees and therefore eligible to vote in the election.

5. Whether the Board properly held, in the circumstances of this case, that evidence that a labor organization coerced employees into signing union authorization cards did not affect the validity of an election held some time after the alleged coercive conduct occurred.

6. Whether the Board properly held that the occurrence during the month between the date of the election and the date of the refusal to bargain of a turnover in personnel larger than the difference between the vote for and against the labor organization did not affect the continuing force and effect of the Board's certification of the labor organization.

7. Whether there is substantial evidence to support the Board's findings that the employer's refusal to bargain was neither motivated nor justified by the labor organization's dissemination of circulars allegedly derogatory of the employer.

The following question urged by petitioner is, we submit, not presented in this case:

8. Whether the results of an election should be set aside because the Board agent who conducted the election (a) failed to challenge persons not named on the eligibility list submitted by the company;[1] and (b) ruled at the election that certain persons whose eligibility to vote was doubtful, were eligible to vote.[2]

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[1] Petitioner's question numbered 1 d (Pet. 7).

[2] Petitioner's question numbered 1 e (Pet. 7).

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, *infra*, pp. 27-28.

STATEMENT

I

THE REPRESENTATION PROCEEDINGS

A. THE HOLDING OF THE ELECTION

On February 27, 1946, most of the Company's employees struck for recognition of the Textile Workers Union of America, C.I.O., herein called the Union, as their bargaining representative (R. 3; 17, 26-27). While the strike was still in effect, the Union, on March 4, 1946, filed with the National Labor Relations Board a petition for investigation and certification of representatives under Section 9 (c) of the Act, seeking exclusive representation of the employees of the Company (R. 50). On March 6, 1946, as a result of mediation efforts of a Federal conciliator an agreement was reached between the Company, the Union, and the conciliator, that the strike be terminated and that "all striking employees be reinstated without discrimination to the job and shift on which they were employed at the time the strike began" (R. 3; 17, 22, 24). It was understood by all parties, however, that prior to the strike the Company had more employees in the finishing room than it might need immediately upon the resumption of operations, and that these employees would be rehired as the need for them

arose (R. 4; 17). The strike terminated and most of the employees returned to work on March 11, 1946 (R. 4; 17).

On March 15, 1946, the regional director ordered a prehearing election to be held on March 22, 1946, pursuant to Article III, Section 3, of the Board's Rules and Regulations (8 Fed. Reg. 16047, as amended, 10 Fed. Reg. 14498, pp. 28-31, *infra*), which at that time permitted the conduct of a secret ballot of employees prior to hearing, in cases which presented no substantial issues. The Company was so advised by a lettter from the regional director on the same date (R. 52).

The qualifications for participation in the election were stated in the Notice of Election (R. 53-55), attached to the regional director's letter advising the Company of the election, and read as follows:

ELIGIBILITY RULES

> Employees described under VOTING UNIT in this Notice of Election who did not work during the designated pay-roll period because they were ill or on vacation or temporarily laid off, and employees in the Armed Forces of the United States who present themselves in person at the polls, shall be eligible to vote. Employees who have quit or been discharged for cause since the designated pay-roll period, and who have not been rehired or reinstated prior to the date of the election, shall not be eligible to vote.

VOTING UNIT

Employees of Worcester Woolen Mills Corporation, Leicester, Massachusetts

Those eligible to vote are all employees of the Company who appeared on the pay roll as of March 12, 1946, excluding executives, office and clerical employees, foremen, and all other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees or effectively recommend such action.

The balloting took place on March 22, 1946 (R. 57). Mr. Jasper, the president and the treasurer of the Company (R. 16), was present before the balloting began and throughout the counting and tabulation of the ballots (R. 45). The Company was informed prior to the election of its right to designate an observer (R. 25, 54), but failed to do so. In order that the Company might have an observer present throughout the balloting, the Board agent who was in charge of the election appointed Mrs. Medeana Hitchcock, the Company's bookkeeper, who had prepared the eligibility list for the Company, to act as the observer for the Company during the balloting (R. 4; 29-30). Mrs. Hitchcock, acting as the Company's observer, and a representative of the Union were present throughout the casting of the ballots and their counting and tabulation (R. 29, 45). Acting on behalf of the Company, she challenged the vote of seven employees (Herbert Maylot, Ann Maylot,

Lindstrom, James Paris, William Paris, Kent and Mongilio) during the course of the election (R. 5, 7, n. 11, 8-9). The union also challenged seven other voters (Hidenfelter, Smith, Donahue, Rivers, Le Blanc, Scheren and Burzell, R. 7, n. 10, 8).

At the close of the voting a "Certification of Conduct of Election" was signed by the representatives of the Union, and the Board, and by Mrs. Hitchcock as representative of the Company; it contained the statement that the "undersigned acted as agents of the Regional Director and as authorized observers, respectively, in the conduct of the balloting" and that they "certify that such balloting was fairly conducted, that all eligible voters were given an opportunity to vote their ballots in secret, and that the ballot box was protected in the interest of a fair and secret vote" (R. 56). Following the counting of the ballots, Mr. Jasper, as treasurer of the Company, and a representative of the Union signed a "Tally of Ballots" (R. 57), in which the agent for the regional director certified that the results of the tabulation of the ballots cast in the election were forty-nine valid votes counted, thirty votes cast for the Union, nineteen votes cast against it, and fourteen challenged ballots.[3] At the bottom of the tally, above the signa-

[3] The observers representing the interested parties at elections have a right to challenge any person whom they believe ineligible to vote (see R. 54). The person challenged is allowed to mark a ballot, but instead of depositing it in the ballot box with the other ballots where its identity would be

tures of Mr. Jasper and the representative of the Union, was the statement that the "undersigned acted as authorized observers in the counting and tabulating of the ballots" and certified "that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained and that the results were as indicated above" (R. 57).

B. THE HEARING IN THE REPRESENTATION CASE

Thereafter on April 30, 1946, the usual hearing[4] was held before a trial examiner to consider the validity of the challenges and such other matters as the parties might raise (R. 13-49).

At the hearing the Company, in addition to urging the validity of its challenges, objected to the conduct of the election on three grounds: (1) the Board agent, without consulting the Company,

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lost, he is required to place it in a sealed envelope which is then marked. The segregated ballot is considered only in the event the tally of ballots reveals that the voting is so close that the challenged ballot might effect the final result. In the latter event, the challenges are ruled upon and if they are overruled, the envelopes are opened and the challenged ballots counted. If the challenges are sustained, the envelopes are never opened.

[4] The hearing was held pursuant to Article III, Section 10, of the Board's Rules and Regulations (8 Fed. Reg. 16047, as amended, 9 Fed. Reg. 7745, and 10 Fed. Reg. 14498, p. 30, *infra*). As amended November 27, 1945, this section provided that in instances of prehearing elections, all issues, including issues with respect to the conduct of the election or conduct affecting the election results and issues raised by challenged ballots, shall be heard at the subsequent hearing.

selected the Company's observer at the election; (2) because of inadequate instructions given the Company's observer five unchallenged individuals cast ballots although ineligible to vote; and (3) certain unlawful actions on the part of the Union in obtaining authorization cards so influenced the employees that they were deprived of a free choice in the election (R. 4-7).

C. THE BOARD'S DECISION AND DIRECTION IN THE REPRESENTATION CASE

On July 11, 1946, the Board issued its decision and direction (R. 1-10), finding as follows:

1. *The Board's rulings on objections to the election.*—Mrs. Hitchcock was the logical person to act as the Company's observer (R. 4). The Company admitted in its brief before the Board, that it was at the time fully informed of its right to appoint its own observer, yet it did not object to having Mrs. Hitchcock so serve and made no effort to designate another person (R. 4). Therefore, there was no prejudicial irregularity in the designation of the Company's observer (R. 4).

Mrs. Hitchcock testified that she received no instructions from the Board agent (R. 4; 34), but the Union observer testified that before any of the five persons in question voted, both observers were instructed by the Board agent, at the same time and in each other's presence, and that the Board agent informed them of their rights, including the privilege of challenging the ballots of employees

they claimed to be ineligible (R. 4-5; 39-40). The latter testimony was corroborated by the fact that the Company's observer actually challenged the ballots of seven persons (R. 5). Accordingly, the Board found that Mrs. Hitchcock was adequately instructed by the Board agent and should have been aware of her right to challenge ballots (R. 5).

The five voters (Lynch, Leonard, Sperry, Dulligan and Hiller) whose ballots were not challenged but who the Company claimed were nevertheless ineligible to vote, were former striking employees who returned to work after the eligibility date, March 12, 1946, but before the election date, March 22, 1946 (R. 6; 35, 43-44). They were not allowed to return to work along with the other employees pursuant to the Company's agreement, because there was no work for them at that time (R. 6, 44). Despite its failure to challenge these voters at the time of the balloting, the Company subsequently contended that these workers were not eligible to vote because they were not on the Company's pay roll on the eligibility date and also because they participated in an illegal strike (R. 6; 43-44, 46).

The Board held that the Company, having failed to challenge the ballots of these five individuals at the election, could not thereafter be heard to object to their eligibility (R. 6); that assuming their eligibility could properly be questioned, they were unmistakably eligible to vote, having been temporarily laid off on the eligibility date and having

been at work at the time of the election (R. 6); and that even if evidence that these five individuals participated in an illegal strike was tendered and proved by the Company, they were nevertheless eligible to vote as there was no overt action taken by the Company to discharge them (R. 6-7). The Board therefore overruled the Company's objection on this ground (R. 7).

The Company as its third objection offered to prove that the Union had coerced the employees into signing union authorization cards and thereby had deprived them of a free choice in the election (R. 5; 46-48). The Board rejected this offer, pointing out that when the employees voted in the election, some time after the misconduct allegedly occurred, they cast secret ballots and thus were not bound by their prior authorization cards. The Board, therefore, held that "assuming the Company had proved such activity on the Union's part, this would not have warranted the conclusion that the employees were deprived of a free choice in the election" and overruled the Company's objection (R. 5-6).

2. *The Board's rulings on challenges to ballots.*— At the hearing the Union withdrew its challenge to the ballot of Burzell and before the Board the Company withdrew its challenge to the ballot of Mongilio (R. 7, ns. 10, 11). With respect to the remaining twelve challenged ballots, the Board overruled the Union's six challenges (to employees

Hidenfelter, Smith, Donahue, Rivers, Le Blanc, and Scheren), on the ground that there was no evidence in the record to support the Union's claim that the challenged workers were supervisory employees (R. 8). Three of the Company's challenges (to employees Herbert Maylot, Ann Maylot and Lindstrom) were sustained on the ground that the voters were not employees on the eligibility date (R. 8, 9). The Company's challenges to the ballots of William and James Paris were overruled (R. 8). They were finishers and former striking employees who had applied for their jobs right after the strike, pursuant to the strike settlement agreement of the Company's president, but because there was no work for them at that time, they were not returned to their jobs until March 13 and April 11, 1946, respectively (R. 8; 18-19, 21-22). When the strike was settled it was understood, according to the testimony of the Company's president, that there might not be work for all finishers, in which case they would be put to work as the need for them arose (R. 4, 8, n. 12; 18). The Board therefore found that these two employees were merely temporarily laid off on the eligibility date, James Paris having continued in this status beyond the date of election and William Paris having been reinstated before that date (R. 8).[5]

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[5] As appears from the eligibility rules set forth, p. —, *supra*, employees who were temporarily laid off were eligible to vote.

The Board did not rule upon the Company's challenge to the ballot of Phillip Kent but stated that it would do so after the opening of the ballots as to which challenges were overruled and the resulting supplemental tally of ballots, if the results thereof showed that Kent's ballot would affect the outcome of the election (R. 9).

3. *The Board's direction.*—In accordance with its foregoing rulings the Board issued a direction to its regional director to open and count the challenged ballots of the eight employees (Hidenfelter, Smith, Donahue, Rivers, Le Blanc, Scheren, William Paris and James Paris) whose eligibility to vote was sustained by the Board and the two employees (Burzell and Mongilio) the challenges to whose ballots had been withdrawn, and thereafter to prepare a supplemental tally of ballots including therein the count of these challenged ballots (R. 10).

D. THE BOARD'S CERTIFICATION OF THE UNION

The revised Tally of Ballots (R. 11) showed that of sixty-seven eligible voters, fifty-nine cast valid votes, of which thirty-two were for the Union and twenty-seven against. Thereupon on July 25, 1946, the Board certified the Union as the representative of the employees in the unit heretofore mentioned for the purpose of collective bargaining (R. 12).

II

THE UNFAIR LABOR PRACTICE PROCEEDINGS

On September 27, 1946, the Union filed an amended charge (R. 93), alleging that on or about August 26, 1946, and at all times thereafter the Company had refused to bargain collectively with the Union, and the usual proceedings then ensued under Section 10 (c) of the Act.

In its answer to the complaint (R. 98-101) the Company admitted that it refused to bargain collectively with the Union but alleged that it properly so refused because the election resulting in the Union's certification was invalid (R. 98-99); because the Union had never been chosen by a majority of the employees (R. 100); because the Union since June 22, 1946 (a date preceding the Board's decision, direction and certification), had ceased to represent a majority of the employees (R. 99); and because the Union had circulated certain statements about the Company and its president, which statements, the Company asserted, "were obviously calculated to create a hostile attitude on the part of employees toward the respondent and its principal officer" (R. 99).

After the usual hearings, the Board, on August 15, 1947, issued its decision and order (R. 58-62), finding that on or about and since August 26, 1946, the Company had refused to bargain collectively with the Union (R. 58, 68). With respect to the Company's claim that it was relieved of its ob-

ligation to bargain because the Union lost its majority after the election, the Board pointed out that the election was held only four months, and the Union was certified only one month, before the Company's refusal to bargain (R. 59). The Board therefore found that at the time of the Company's refusal to bargain the Union's certification remained in full force and effect (R. 59). In support of this finding the Board declared that "administrative expediency and stable labor relations require that reasonable durability be accorded to Board determinations based upon the results of secret elections, and that the choice of a majority recently expressed therein not be subject to revocation with every shift in sentiment or personnel" (R. 59-60).

The Board further found that the record did not rebut the presumption of the Union's continuing status as representative. The Board pointed out that even if it were assumed that eight employees who terminated their employment after the election and who had been seen on the Union's picket line during the strike, had cast ballots in favor of the Union, it was also possible that the four other employees, who also left their employment after the election, had cast their votes against the Union or that formerly anti-union employees had changed their attitude toward the Union (R. 60).

The Company's final contention, that the distribution of two union circulars justified the Com-

pany's refusal to bargain, was also rejected by the Board (R. 60). The Board found that one circular, issued about a week after certification and before the refusal to bargain, was actually nothing more than an appeal for members (R. 60; 91, 104-105). The other contained a severe criticism of the Company for refusing to bargain with the Union after it had been certified (R. 60; 91, 103). It was issued three weeks after the refusal to bargain (R. 60; 91, 103). The Board found that these circulars did not motivate the Company's initial refusal to bargain, and that their circulation did not constitute a valid reason for the Company's continuing failure to do so (R. 60).

The Board accordingly concluded (R. 58, 69-70) that the Company's refusal to bargain constituted a violation of Section 8 (5) and (1) of the Act and ordered the Company to cease and desist from refusing to bargain collectively with the Union and from interfering in any manner with the efforts of the Union to so bargain with the Company, to bargain collectively with the Union upon request, and to post appropriate notices to that effect (R. 61-62).

The Board thereafter filed in the court below a petition for enforcement of its order (R. 106-109). On October 4, 1948, the court handed down its opinion (R. 129-136) sustaining the Board's order in full. On the same day, the court entered its decree of enforcement (R. 136).

ARGUMENT

The Company does not attempt to show conflict between the decision below and that of any other Court of Appeals. Nor does it deny that the decision below is in accord with the rulings of this Court. The Company claims that the case presents questions of importance in the administration of the Act. Clearly, however, none of the questions presented is either novel or of any substantial importance.

1. The Company contends that the election which resulted in the certification was invalid because the Board agent conducting the election selected the company observer (Pet. 10, 11). It is settled that the Act does not require that the Board permit the Company to appoint an observer. *Marlin-Rockwell Corp.* v. *National Labor Relations Board,* 116 F. 2d 586, 588 (C.A. 2), certiorari denied, 313 U. S. 594. The absence of any company observer would not have invalidated the election. *Southern Steamship Co.* v. *National Labor Relations Board,* 316 U. S. 31, 37. And this Court has many times ruled that the Board has wide discretion with respect to the conduct of elections. *National Labor Relations Board* v. *A. J. Tower Co.,* 329 U. S. 324, 328; *Southern Steamship Co.* v. *National Labor Relations Board, supra; National Labor Relations Board* v. *Waterman Steamship Co.,* 309 U. S. 206; *National Labor Relations Board* v. *Falk Corp.,* 308 U. S. 453, 458.

Moreover, under the facts here presented, the Company cannot contend that the Board agent committed prejudicial error in selecting the company observer. As the court below pointed out (R. 134), the Company had failed itself to select an observer, although notified to do so; the observer selected by the Board agent was the logical person to act as the company observer; and, although Mr. Jasper, the company's president and treasurer, was present at the election on at least two occasions during the day and had himself participated to some extent in the proceedings, the Company expressed no objection to the appointment of the observer until two months after the election. This contention was raised for the first time in the brief filed by the Company with the Board on May 27, 1946, which was after the post-election hearing of April 30, 1946, and more than two months after the election held on March 22, 1946. Furthermore, the observer appointed did challenge seven voters (R. 5, 7, 8-9). The Company has had the full benefit of these challenges and was successful before the Board in sustaining three of them (R. 8-9).

2. It is contended (Pet. 7, 11) that the Board agent failed properly to instruct the company observer. The evidence summarized above (pp. 9-10, *supra*) clearly shows that before any of the employees who the Company asserts were ineligible cast their ballots, the Board agent fully and amply instructed the company observer.

3. The Company asserts that seven (Lynch, Leonard, Sperry, Dulligan, Hiller, William Paris and James Paris) of the employees who voted were ineligible to vote (Pet. 12-14). Of the seven, petitioner failed to challenge five (Lynch, Leonard, Sperry, Dulligan and Hiller). It was not until the post-election hearing that the Company raised the objection that these five were ineligible (R. 44). The Board rejected these challenges because they were post-election challenges (R. 6) and the court below upheld the Board (R. 135). *National Labor Relations Board* v. *A. J. Tower Co.*, 329 U. S. 324.

4. With respect to these seven employees, the Company contends that the Board erred in failing to give effect to a company rule that "employees who left their work voluntarily, lost their status as employees" (Pet. 12-13). The court below noted that the Company did not press this contention "very vigorously, nor would it avail it anything if it did" (R. 135).

In its petition before this Court (p. 13), the Company cites a number of cases in support of its argument that the Board was bound to give effect to the so-called company rule. However, the cases cited all relate to the proposition that a company rule with respect to union activities on company premises is a valid exercise of an employer's rights if applied without discrimination. But neither that proposition, nor any such rule, is involved here.

In substance, it is urged that since the Company had always regarded employees who voluntarily quit as terminating their employment the striking employees lost their status as employees under the Act solely because they left their work to strike. It is settled, however, that persons who cease work as a consequence of and in connection with a current labor dispute remain employees within the meaning of the Act.[6] *National Labor Relations Board* v. *Mackay Radio and Telegraph Co.*, 304 U. S. 333, 345. Obviously, the Company cannot, by promulgating this so-called company rule, amend the Act or overrule the authorities.

The Company further argues in support of its contention that these seven employees lost their employment status, that, in substance, (a) the strike was an illegal strike because an employees' committee had earlier agreed that an election would be conducted to determine the bargaining representative, and (b) the employees did not strike for union recognition and, therefore, there was no current labor dispute (Pet. 13). A number of cases are cited in support of this argument (Pet. 13). But the cited cases all involve strikes by minority groups without the consent of the duly designated representative. The instant case pre-

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[6] Insofar as it is here pertinent, Section 2 (3) of the Act declares that the "term 'employee' * * * shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute * * * "

sents no such situation. In no other respect is it claimed that the strike was an illegal strike.

Moreover, participation in an unlawful or illegal strike does not automatically terminate the employee status. It may make the employee subject to discharge but, if the employer does not in fact discharge the employee, his employee status remains unchanged. *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 256; *National Labor Relations Board* v. *Aladdin Industries, Inc.*, 125 F. 2d 377, 382 (C. A. 7), certiorari denied, 316 U. S. 706. It is undisputed that the Company did not, by any overt act, discharge any of the striking employees.

And, where, as here, a settlement agreement is reached wherein the employer agrees to reinstate all strikers, he cannot thereafter exercise his privilege of discharge by denying reinstatement. *Stewart Die Casting Corp.* v. *National Labor Relations Board*, 114 F. 2d 849, 855, 856 (C. A. 7), certiorari denied, 312 U. S. 680; *National Labor Relations Board* v. *Aladdin Industries, Inc., supra.* Indeed, the employees who the Company challenged on this ground did return to work as soon as work was available for them. Of the two employees challenged because they were not on duty on the eligibility date, one was back at work on March 13, 1946, one day after the eligibility date, and the other returned after the election but before the post-election Board hearing (R. 8, 18, 21, 38).

The five employees with respect to whom the Board refused to entertain post-election challenges (*supra*, p. 10) also returned to work as soon after the eligibility date as work was available for them. All were back before the election date. (R. 6; 34-35, 43-44.) Had the Company challenged these five employees, its challenges would have been on the same grounds as those of the two actually challenged (R. 44).

Plainly, on the eligibility date the strikers had the status of temporarily laid-off employees. *National Labor Relations Board* v. *Somerset Shoe Company*, 111 F. 2d 681, 688 (C. A. 1); *North Whittier Heights Citrus Ass'n* v. *National Labor Relations Board*, 109 F. 2d 76, 82 (C. A. 9), certiorari denied, 310 U. S. 632; *National Labor Relations Board* v. *Carlisle Lumber Co.*, 94 F. 2d 138, 144-145 (C. A. 9), certiorari denied, 304 U. S. 575; *Jeffery-DeWitt Insulator Co.* v. *National Labor Relations Board*, 91 F. 2d 134, 136-138 (C. A. 4), certiorari denied, 302 U. S. 731. As such, they were entitled to vote in the election. *Marlin-Rockwell Corp.* v. *National Labor Relations Board*, 116 F. 2d 586, 588 (C. A. 2), certiorari denied, 313 U. S. 594.

5. The Company contends that the Union lost its majority after the election, but before it was certified (Pet. 15-16).[7] The court below (R. 135)

[7] The election was held on March 22, 1946 (R. 57), the post-election hearing was conducted on April 30, 1946 (R. 13-49), the Board's decision and Direction was issued on July 11, 1946

properly sustained the Board's refusal (*supra*, pp. 14-15) to upset a certification only a month old. *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U. S. 702, 705. In any event, the evidence (summarized at p. 14, *supra*) clearly affords support to the conclusion of the court below (R. 135) that, as the Board found (R. 60), there was no showing of a loss of majority.

6. The Company contends that the Board erroneously excluded evidence of conduct on the part of the Union which allegedly coerced the employees into signing authorization cards (Pet. 16). It is urged that the coercive conduct, which allegedly occurred before and during the strike, affected the validity of the election. Obviously, this contention presents no question of general importance. The court below noted that this is one of the contentions which the Company did not press very vigorously and which clearly had no merit (R. 135). In any event, the Board properly held that, even if true, evidence that employees had been coerced into signing union authorization cards did not warrant the conclusion that the employees were deprived of a free choice in an election. As the Board pointed out (R. 5-6), the employees were protected in their right freely to select their bargaining representative in an election conducted by secret ballot some

(R. 10), and the Board issued its certification on July 25, 1946 (R. 12). The Company admits that on and after August 26, 1946, it refused to bargain collectively with the Union (*supra*, p. 14).

time after the alleged misconduct, and it cannot be assumed that their vote was in any way restrained simply because they had been forced to sign authorization cards at an earlier date.

7. It is also contended that the Board erred in excluding evidence that the Union disseminated circulars allegedly derogatory of the Company (Pet. 16). It is urged that these circulars justified the refusal to bargain. But the evidence clearly warrants the Board's finding (R. 60), sustained by the court below (R. 136), that the dissemination of these circulars neither motivated nor justified the Company's refusal to bargain. One of the circulars (R. 91, 104-105), issued before the refusal to bargain, was only an appeal for members and in no sense derogatory of the Company. The other circular, which did criticize the petitioner, was issued after petitioner had refused to bargain, and it criticized petitioner for refusing to bargain (R. 91, 103).

National Labor Relations Board v. *Aintree Corp.*, 135 F. 2d 395 (C. A. 7), cited by petitioner (Pet. 16), is not in point. It did not involve a refusal to bargain because of circulars derogatory of the employer. In that case, the employer disciplined two employees for distributing, on company property and in violation of a company rule, leaflets which fostered hostility between two rival groups of employees. It was because the leaflets were derogatory of employees, thereby creating dissen-

sion in the plant among the employees, and not because the leaflets were insulting to the employer, that the court deemed the leaflets censurable.

8. In addition to the contentions discussed above, the Company also urges that the election was invalid because the Board agent conducting the election (a) himself failed to challenge persons who were not on the eligible list and whose eligibility was doubtful, and (b) ruled that certain persons whose eligibility to vote was doubtful, were eligible to vote (Pet. 7, 12). These contentions were not raised before the Board, and, therefore, may not be heard now. *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U. S. 385, 387-389; *May Department Stores Co.* v. *National Labor Relations Board*, 326 U. S. 376, 386-387.

But, if these issues could be raised, the Company could not prevail. There is no evidence to show that the Board agent knew or should have known that the five employees who voted without challenge and who, it is urged, should have been challenged by the Board agent, were ineligible to vote; nor is there any evidence to show that their eligibility was doubtful. Indeed, the Board properly found (R. 6), as we have shown above, that these employees were eligible to vote.

Nor did the Board agent make any ruling at the election with respect to the eligibility of any employee. By permitting an employee to vote subject to a challenge upon which the Board subsequently

rules, the Board agent makes no ruling with respect to eligibility.

CONCLUSION

The petition for certiorari should be denied.

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JANUARY 1949

APPENDIX

1. The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C., 151 *et seq.*) are as follows:

SEC. 2. When used in this Act—

* * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

* * * * *

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

* * * * *

SEC. 9 (d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to sub-

section (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

* * * * *

2. The relevant provisions of the Rules and Regulations of the National Labor Relations Board, Series 3 (8 F. R. 16047, as amended, 10 F. R. 14498) are as follows:

Article III

PROCEDURE UNDER SECTION 9 (C) OF THE ACT FOR THE INVESTIGATION AND CERTIFICATION OF REPRESENTATIVES

* * * * *

SEC. 3. *Same; investigation by Regional Director; definition of parties; Notice of Hearing; service of notice; withdrawal of notice.*—After a petition has been filed, if it appears to the Regional Director that an investigation should be instituted he shall institute such investigation, provided that the Regional Director shall not institute an investigation on a petition filed by an employer unless it appears to the Regional Director that two or more labor organizations have presented to the employer conflicting claims that each represents a majority of the employees in the bargaining

unit or units claimed to be appropriate.[2] The Regional Director shall prepare and cause to be served upon the petitioners and upon the employer or employers involved (all of whom are hereinafter referred to as "the parties"), and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation, a Notice of Hearing upon the question of representation before a Trial Examiner at a time and place fixed therein, provided that when the petition is filed by an employer the Regional Director shall serve the Notice of Hearing on the employer petitioner and on the labor organizations named in the petition (all of whom are hereinafter referred to as "the parties"), and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation. A copy of the petition shall be served with such Notice of Hearing. Any such Notice of Hearing may be withdrawn before the hearing by the Regional Director on his own motion.

* * * * *

SEC. 9. *Proceeding before Board; briefs; further hearing; Direction of Election; Certification of Representatives.*—The Board shall thereupon proceed, either forthwith upon the record, or after oral argument or the submission of briefs, or after further hearing, as it may determine, to direct a

[2] At any stage of the investigation, either before hearing or after the hearing but before transfer of the case to the Board, the Regional Director may in cases which present no substantial issues, conduct a secret ballot of the employees, or he may decline to continue the investigation.

secret ballot of the employees in order to complete the investigation, or to certify to the parties the name or names of the representatives that have been designated or selected, or to make other disposition of the matter. Should any party desire to file a brief with the Board, the original and three copies thereof shall be filed with the Board at Washington, D. C., within seven days after notice of transfer of case to the Board. Immediately upon such filing, the party filing the same shall serve a copy thereof upon each of the other parties.

* * * * *

SEC. 10. *Election procedure; Tally of the Ballots; Objections; Report on Challenged Ballots; Report on Objections; Exceptions; action of Board; hearing; contents of record.*—Unless otherwise directed by the Board, all elections shall be conducted under the supervision of the Regional Director in whose Region the proceeding is pending. Upon the conclusion of such election, the designated agent shall cause to be furnished to the parties a Tally of the Ballots. Within five (5) days thereafter, the parties may file with the designated agent an original and three copies of Objections to the conduct of the election or conduct affecting the results of the election. Copies thereof shall be served upon each of the other parties by the party filing such Objections.

If no such Objections are filed within five (5) days after the conclusion of the election, and if the challenged ballots are insufficient in number to affect the result of the election, the designated agent shall forthwith forward to the Board in Washington, D. C., the Tally of the Ballots which, together with the rec-

ord previously made, shall constitute the record in the case, and the Board may thereupon decide the matter forthwith upon the record, or may make other disposition of the case.[3] * * *

[3] This and the subsequent provisions of this section do not apply to elections conducted by the Regional Director as part of the investigation before hearing (see footnote 2 of this part). In such instances, the Regional Director, following the election, shall provide for an appropriate hearing upon due notice to all parties, unless it appears to him that the investigation should not be continued; and all issues, including issues with respect to the conduct of the election or conduct affecting the election results and issues raised by challenged ballots, shall be heard at such hearing.

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